Nos. 92-484 and 92-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Respondents.

STEPHEN L. STEINBRINK,
ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

STATEMENT

A. Background

To protect the integrity of the banking system, prevent unfair competition, and safeguard the general public, federally-regulated banking institutions, including national banks, are generally prohibited from engaging in the business of insurance. Section 24 of the National Bank Act, 12 U.S.C. § 24 (Seventh), which sets forth the powers of national banks, has been consistently inter-

preted as strictly limiting the permissible insurance-agency activities of national banks.[1]

In 1916, then-Comptroller John Skelton Williams urged Congress to enact a narrow exception to this general prohibition to provide a modicum of financial assistance to nationally-chartered banks located in "small country communities," which had experienced financial difficulties. 53 Cong. Rec. 11001 (1916) (Resp. Ldg. 26).[2] Empowering these "small national banks" to sell insurance would "provide them with additional sources of revenue," and thereby ensure that inhabitants of sparsely populated areas had access to banking services. *Id.*[3] Comptroller Williams noted that under the National Bank Act, national banks were not then given the power to act as agents for insurance companies. *Id.*, citing *Logan County Nat'l Bank v. Townsend*, 139 U.S. 67 (1891).

Comptroller Williams drafted proposed legislation authorizing national banks located in towns of not over 3,000 population to act as insurance agents. *Id.* Because the proposed amendment granted a new power to national banks, he recommended that it be added to the National Bank Act, and specifically drafted his proposal as an amendment to the National Bank Act. *See id.* The National Bank Act, at the time, was codified in the Revised Statutes. *See infra* n.19. Senator Owen introduced the Comptroller's proposed legislation (changing

[1] *See, e.g., Saxon v. Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010, 1016 (5th Cir. 1968) (under Section 24(7), "no national banks possessed *any* power to act as insurance agents") (emphasis in original).

[2] "Resp. Ldg." refers to the various legislative materials and pleadings cited by respondents that have been lodged with the Clerk of Court.

[3] Comptroller Williams made clear that country banks should be permitted to sell insurance only in their local communities, for then their insurance activities would not be "likely to assume such proportions as to distract the officers of the bank from the principal business of banking." *Id.*

the 3,000 figure to 5,000)[4] as an amendment to a bill already under consideration by the 1916 Congress, and moved that the amendment be inserted after the introductory phrase: "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows." *See* 53 Cong. Rec. 11153 (1916) (Pet. Ldg. 10). Section 5202 of the Revised Statutes was part of the National Bank Act. The amendment was agreed to by the Senate without debate, *id.*, and was later codified (for a time) as Section 92 of the National Bank Act. As of 1952, however, the codifiers have omitted Section 92 from the U.S. Code.

B. Proceedings In This Case

1. Petitioner, United States National Bank of Oregon (the "Bank") is a national bank with its principal place of business in Portland, Oregon. In 1984, the Bank applied to petitioner the Comptroller of the Currency to establish a new subsidiary in a community with a population of less than 5,000 for the purpose of offering a full range of insurance products. 92-428 Pet. App. 44a. In August 1986, the Comptroller approved the Bank's application. The Comptroller concluded that, pursuant to Section 92, "a national bank or its branch which is located in a place of 5,000 or under population may sell insurance to existing and potential customers *located anywhere*." 92-507 Pet. App. 75a (emphasis added).

2. Respondents[5] challenged the Comptroller's ruling in the United States District Court for the District of

[4] This was the only apparent change from the Comptroller's drafted proposed amendment to the National Bank Act. *See* 53 Cong. Rec. 11153 (1916). In making the change, Senator Owen stated that "[t]he matter is unimportant either way." *Id.*

[5] Independent Insurance Agents of America, Inc.; Independent Insurance Agents of Oregon; National Association of Casualty and Surety Agents; National Association of Life Underwriters; National Association of Professional Insurance Agents; National Association of Surety and Bond Producers; Oregon Association of Life Underwriters; and Oregon Professional Insurance Agents, Inc.

Columbia, arguing that the agency's approval was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, pursuant to 5 U.S.C. § 706(2)(A).[6] Respondents contended that the Comptroller's action would authorize national banks to enter the general insurance business in violation of Section 92. In their summary judgment brief, respondents noted:

> [a]s a technical matter, Section 92 may no longer exist. The 1916 amendments to Section 5202 of the Revised Statutes included, *inter alia*, the provisions that became 12 U.S.C. § 92. In 1918, Section 5202 was re-enacted but, for some unknown reason, the provisions of 12 U.S.C. § 92 were omitted from the recodification.[7]

Respondents acknowledged that Congress and courts had treated Section 92 as existing, but respondents themselves took no position on the issue. *Id.*

The district court observed that Section 92 "no longer appears in the United States Code," and concluded that the statutory provision "apparently was inadvertently repealed in 1918." 92-507 Pet. App. 44a n.2. The court nonetheless "assume[d] that the statute exists *in proprio vigore*," because "Congress, other courts and the Comptroller have presumed its continuing validity." *Id.* The district court went on to affirm the Comptroller's action as authorized by Section 92.

3. In their opening brief to the court of appeals, respondents stated that Section 92 "appears to have been repealed inadvertently in 1918," but again noted that others had "presumed" its validity.[8] The court of appeals

[6] The Bank intervened as a defendant.

[7] Memorandum in Support of Cross-Motion of Plaintiffs for Summary Judgment and in Opposition to Motions of Defendants and Defendant-Intervenor for Dismissal and/or Summary Judgment, at 14 n.9 (filed 3/11/87).

[8] Brief of Appellants, at 5 n.3 (filed 12/21/90).

ordered the parties to be prepared to address Section 92's status at oral argument, and there was specific questioning on the issue.[9] More than five months later, the court ordered the parties to submit post-argument briefs (1) addressing whether the court should resolve the question of Section 92's validity, and (2) providing additional support for 92's continued existence. Although the Comptroller argued, in response, that the court should not reach the issue, respondents maintained that resolving the question of Section 92's validity would decide respondents' claim and then went on to explain that there was conflicting post-1918 evidence on the issue.[10]

The court of appeals reversed the district court, concluding that Section 92 was repealed and, once repealed, could only be reinstated by Congress, which has not done so. Noting that Section 92's omission from the U.S. Code gives rise to a statutory presumption of invalidity, *see* 1 U.S.C. § 204(a), the court concluded that it "not only [had] the right to inquire into its validity, [it had] the duty to do so." 92-507 Pet. App. 6a. The court of appeals recognized that courts must sometimes go beyond

[9] Counsel for respondents stated that he did not believe he could contest Section 92's existence given that the Supreme Court, while noting Section 92's curious history, has presumed its validity. Transcript of Oral Arg. at 3-4.

[10] *See* Supplemental Brief of Appellants (filed 9/25/91). As respondents explained in their post-argument brief, in 1982, they had advocated the revision of the Bank Holding Company Act to make clear that holding companies could engage in insurance sales in only a few narrowly circumscribed instances. In this context, respondents supported a provision explicitly designed to parallel Section 92. *See* 12 U.S.C. § 1843(c)(8)(C)(i). That support necessarily assumed the continued existence of Section 92. For this reason, if for no other, respondents felt it would be viewed as inconsistent to argue before the court of appeals that Section 92 is not valid. However, the court having itself broached the issue, respondents urged the court to resolve it. On the merits, respondents took no position on whether Section 92 was valid or not.

the specific legal theories advanced by the parties. *Id.* 5a-6a.

The court carefully examined the text of the Statutes at Large and concluded that "the language and punctuation . . ., traditionally construed, support the codifier's conclusion that Section 92 was repealed." *Id.* 10a. The court found that Section 92 had been enacted by Pub. L. No. 64-270, 39 Stat. 752, 753 (1916) (the "1916 Act"), and concluded that, "on its face, the 1916 [Act] had the effect of placing section 92 within section 5202 of the Revised Statutes." 92-507 Pet. App. 9a.[11] The court observed that the War Finance Corporation Act of 1918, Pub. L. No. 65-121, § 20, 40 Stat. 506, 512 (1918) (the "1918 Act"),[12] which states that it *amends* Rev. Stat. § 5202 "to read as follows," omits the paragraph now known as Section 92 from its statement of the entire text of the amended Section 5202. Accordingly, the court concluded that Section 92 is deemed repealed. 92-507 Pet. App. 9a-10a.

The court of appeals rejected petitioners' invitation to override "a literal reading of the 1916 and 1918 statutes." *Id.* 10a. The court refused to ignore the quotation marks used in the 1916 Act to define the amended Rev. Stat. § 5202: "Like it or not, they are an integral part of the bill that the President signed into law and that was enrolled in the Statutes at Large." *Id.* 19a. The court concluded that petitioners had failed to produce any concrete evidence demonstrating that the 1918 Congress did not intend to repeal Section 92. *Id.* The court then pointed to evidence indicating that the 1918 Congress would have realized that Section 92's exclusion from the amended Rev. Stat. § 5202 would result in its repeal: three extant sources as to current law at the time

[11] *See* 92-507 Pet. App. 23a-25a. The 1916 Act is reproduced in full in Resp. Ldg. 27-31.

[12] *See* 92-507 Pet. App. 26a. The 1918 Act is reproduced in full in Resp. Ldg. 52-62

reported that, as a result of the 1916 Act, Section 92 was part of Rev. Stat. § 5202. *Id.* 12a-13a.

After noting that post-1918 views with respect to Section 92's existence were not unanimous, the court ruled that subsequent treatment of Section 92 by Congress, agencies and the courts could not resolve whether the 1918 Congress had repealed the provision. *Id.* 12a-13a, 15a-16a. No subsequent Congress had re-enacted Section 92, and "[f]ederal agencies have no authority to reinstate a statute that Congress has repealed." *Id.* 15a. No prior court had found that Section 92 remains valid; at most, they had merely *presumed* that it does. *Id.* 15a-18a.

Finally, the court declined to rewrite history:

> It is one thing for a court to bend statutory language to make it achieve a clearly stated congressional purpose; it is quite another for a court to reinstate a law that, intentionally or unintentionally, Congress has stricken from the statute books. If the deletion of section 92 was a mistake, it is one for Congress to correct, not the courts.

Id. 19a-20a.

Judge Silberman, dissenting, did not disagree with the majority's conclusion regarding Section 92's non-existence. Instead, he disagreed with the court's decision to reach the issue, concluding that respondents' failure to challenge Section 92's validity should have ended the matter. Judge Silberman did *not* assert that the court was without power to address the issue, but rather that it should have refrained from doing so as a matter of "judicial restraint." *Id.* 27a-33a.

Petitioners sought rehearing. No member of the court of appeals voted to reconsider the majority's conclusion that Section 92 had been repealed. Judge Silberman, joined by two other judges, voted to reconsider only whether the court should have reached the question. Judge Sentelle, joined by Judges Buckley and Henderson,

responded that "it is within the Court's power to determine the existence of a statute essential to the determination of a case or controversy whether or not the parties assume or stipulate that the statute does or does not exist." *Id.* 37a.

SUMMARY OF ARGUMENT

The intentions of individual members of the Senate and House of Representatives become law only through a formal process strictly defined by Article I of the Constitution. Courts interpret and apply the law that emerges. Separation of powers principles fundamental to our constitutional scheme, however, preclude courts from ignoring the law or correcting it, even when Congress' actions appear sloppy, inadvertent, or mistaken.

The statutory provision at issue here was enacted in 1916 as part of Rev. Stat. § 5202, as is clear from the text of the enrolled bill and Statutes at Large. When Rev. Stat. § 5202 was amended and restated two years later, Section 92 was omitted. Congress thereby expressly repealed Section 92, whether accidentally or intentionally is irrelevant. Congress' 1918 repeal is final until *Congress* changes the status quo by taking the appropriate formal legislative actions defined in the Constitution, federal statutes, and House and Senate rules. Congress has not done so. Section 92 thus does not exist.

Petitioners ask this Court to ignore the text of the statute enacted by the 1916 Congress and the text of the amendments enacted by a later Congress in 1918. Petitioners instead would have this Court foray into "what-if's." What would Congress have done if it had expressly debated whether Section 92 should be incorporated into the Revised Statutes or the Federal Reserve Act? What would Congress have done if it had expressly debated the future of bank-run insurance operations? What would a "sensible" Congress have done? The Court is not free to undertake such a journey.

Petitioners' argument depends on the Court's willingness to take two critical steps. First, the Court must ignore the punctuation Congress chose to use in the 1916 Act to mark the beginning and end of the amended Rev. Stat. § 5202. Petitioners' argument hinges on removal of these quotation marks—for with the marks, there can be no question whatsoever that Section 92 was enacted as an amendment to Rev. Stat. § 5202, and therefore was repealed by its omission from Section 5202 as restated in the 1918 Act. Second, the Court must ignore Congress' express statement in the 1916 Act that it was *amending* Rev. Stat. § 5202. Petitioners' argument is premised on the proposition that, despite the plain meaning of the text it enacted, the 1916 Congress merely restated Rev. Stat. § 5202 unchanged—for if Rev. Stat. § 5202 was amended by the 1916 Act, Section 92 was unquestionably included as part of that amendment, and was then repealed in 1918.

The "enrolled bill" doctrine precludes courts from looking to pre-enactment legislative materials to override the contents of the enrolled bill. *Marshall Field Co. v. Clark*, 143 U.S. 649 (1892). This Court must accept the 1916 Act as Congress enacted it. It cannot assume that the quotation marks were unintended. In any event, even without the quotation marks, the text of the 1916 Act, especially its use of introductory phrases, shows that Section 92 was made part of Rev. Stat. § 5202. Moreover, placing Section 92 in Rev. Stat. § 5202 was entirely consistent with the substance of the federal banking laws, as Rev. Stat. § 5202 was a part of the National Bank Act, the paramount source of national banks' powers. Section 92 was proposed and drafted by then-Comptroller Williams as an amendment to the National Bank Act. Congress acted directly upon Comptroller Williams' proposal, without debate.

Petitioners' attempt to concoct a different interpretation of the text is unavailing. The 1916 Act's failure to state expressly *in its title* that the Act amended Rev.

Stat. § 5202 is meaningless. Legislation often included amendments that were not announced in the title. Likewise, Congress' use of the phrase "this Act" is merely a reference to the "Federal Reserve Act"; it says nothing about the *placement* of Section 92.

Nor can petitioners garner support for their argument from the subsequent actions of Congress, the courts, and the federal banking agencies. Even if the texts of the statutes were ambiguous—and they are not—an agency's view on whether a particular statutory provision was enacted or repealed is not entitled to deference; that is a quintessential judicial judgment. In any event, the contemporaneous view of the agency charged with implementing Section 92 was that it was enacted as an amendment to Rev. Stat. § 5202. Court decisions offer no support because no court prior to the D.C. Circuit had decided whether Section 92 was repealed. Post-1918 Congresses differed as to whether Section 92 existed. When in the 1980s, Congress apparently presumed Section 92's continued existence, Congress was mistaken. That mistake casts no light on what the 1916 and 1918 Congresses did. Nor does it revive the repealed statute. No Congress has re-enacted Section 92. Even if this Court believes that Section 92's repeal was inadvertent, it is Congress that must correct the "mistake."

The Bank, but not the federal petitioners, contend that the court of appeals should not have even reached the question of Section 92's validity because respondents did not allege that it was repealed. The federal petitioners, on the other hand, recognize that the court was empowered to address this issue because it is simply alternative reasoning that resolves respondents' claim that the Comptroller cannot rely upon Section 92 to empower national banks to sell insurance outside small towns; it is not a separate and distinct claim. The court's exercise of discretion to resolve the issue here was clearly proper: the alternative would be to interpret a statute the court believed did not exist. And the court provided all interested parties with ample opportunity to address the issue before the court resolved it.

ARGUMENT

I. THE TEXT OF THE 1916 AND 1918 ACTS DEMONSTRATES THAT CONGRESS REPEALED SECTION 92 IN 1918.

A. Separation of Powers Principles Dictate That This Court Accept What Congress Did and Refrain From Considering What a Purportedly "Sensible" Congress Would Have Done.

"This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 109 S.Ct. 647, 658 (1989). Congress has the sole power and authority to make law. The Framers of the Constitution carefully crafted the procedures that must be followed in adopting, amending or repealing legislation.[13] "[T]he prescription for legislative action in Article I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *INS v. Chadha*, 462 U.S. 919, 951 (1983). The bicameral and presentment requirements of Article I are critical to the constitutional design. *Id.* at 946-951.

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[13] The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const., Art. I, § 1. Before it becomes law, a bill must pass both the Senate and the House of Representatives and be presented to the President for approval or disapproval, in which case it must be repassed by two thirds of the Congress. U.S. Const., Art. I, § 7, cls. 2 & 3. There is "[n]o provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Article I." *INS v. Chadha*, 462 U.S. 919, 954 n.18 (1983).

Once these requirements are fulfilled, the legislation becomes the law of the United States. The judiciary may not second-guess the law's existence or non-existence. *See Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892). "Mutual regard between the coordinate Branches, and the interest of certainty, both demand that official representations regarding such matters of internal process be accepted at face value." *United States v. Munoz-Flores*, 110 S.Ct. 1964, 1978-79 (1990) (Scalia, J., concurring). The courts are properly confined to interpreting the law as it exists, applying it to particular situations, and assessing whether it is consistent with the Constitution. Courts are *not* empowered to enact, amend or repeal laws—on policy or other grounds. Any attempt to do so threatens the delicate balance of power the Constitution has struck.

These fundamental principles dictate the proper analysis in this case. "Based on separation of powers considerations, the [enrolled bill] doctrine precludes judicial inquiry into any procedural defects that take place before the executive has signed the bill." *Cherry v. Steiner*, 716 F.2d 687, 693 n.5 (9th Cir. 1983), *cert. denied*, 466 U.S. 931 (1984). Courts must accept the contents of statutes as they have been enrolled and printed in the Statutes at Large.[14] This Court cannot, in the guise of statutory construction, ignore the statutory text. Petitioners effectively urge this Court "to first determine the legislative intentions and then proceed to change the words used in an attempt to justify the predetermined conclusion"; this, the Court cannot do. *DeSoto Secs. Co. v. Commissioner of Internal Rev.*, 235 F.2d 409, 411 (7th Cir. 1956).

"It is not a function of this Court to presume that Congress was unaware of what it accomplished." *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (in-

[14] The "enrolled bill" is the document that has passed both Houses of Congress and is signed by the presiding officers of both Houses and sent to the President. 1 U.S.C. § 106. Once signed by the President, it is sent directly to the Archivist of the United States, 1 U.S.C. § 106a, who compiles and publishes the Statutes at Large in conformance with the enrolled bills. 1 U.S.C. § 112.

ternal quotations omitted). Thus, if the repeal of Section 92 was "inadvertent," it is of no significance. It is not this Court's task to correct mistakes or remedy congressional inadvertence. As the Court made clear in *West Virginia Univ. Hosp. Inc. v. Casey*, 111 S.Ct. 1138 (1991), "it is not our function to eliminate clearly expressed inconsistency of policy, ... The facile attribution of congressional 'forgetfulness' cannot justify such a usurpation." *Id.* at 1148. Here, as in *West Virginia Univ. Hosp.*, " '[w]hat the government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.' " *Id.*, quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926). *See also United States v. Goldenberg*, 168 U.S. 95, 103 (1897) ("Certainly, there is nothing which imperatively requires the court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do.").

The proper branch of government to fill gaps created by repeals—whether inadvertent or not—is the legislative branch. *See, e.g., Whitney v. State Tax Comm'n*, 309 U.S. 530, 535-37 (1940).[15] It is Congress' role to craft and

[15] It is not unusual for the legislature to "inadvertently" repeal statutory provisions when making later legislative adjustments; when the "mistake" is discovered, it is corrected. The legislature is empowered and institutionally capable of making such corrections. *See, e.g., Whitney v. State Tax Comm'n of New York*, 309 U.S. 530, 536 (1940) (legislature filled "unintended" holes it had earlier created); *United States v. Riker*, 670 F.2d 987, 988 (11th Cir. 1982) (Congress closed loophole created by earlier "inadvertent[] repeal"); *United States v. Hayes*, 653 F.2d 8, 16 (1st Cir. 1981) (1980 Congress enacted legislation to fill void created when 1970 Congress "inadvertently repealed" statutory provision); *Texaco v. Louisiana Land & Exploration*, 805 F. Supp. 385, 388 (M.D. La. 1992) (legislature "corrected its oversight" in inadvertently repealing provision two years earlier); *Cornelius v. Facilities Mngmt. Co.*, 375 F. Supp. 916, 917 (D. Hawaii 1974) (same). *See also Narlidis v. Sewell*, 524 F.2d 371, 373 n.1 (9th Cir. 1975) (acknowl-

enact legislation; Congress may not constitutionally delegate that responsibility to the courts. If the repeal of Section 92 was a "mistake," it is for Congress to correct. This Court "should not legislate for them." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 427 (1985). *Accord Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 364-65 (1986).

B. The Text of the Statutes at Large Demonstrates That Section 92 Was Repealed by the 1918 Act.

Congress has established strict rules of statutory recognition. It has directed that the "*current*" version of the U.S. Code "establish[es] prima facie the laws of the United States." 1 U.S.C. § 204(a) (emphasis added). Petitioners concede, as they must, that Section 92 does not appear in the Code. This creates a strong presumption that the law does not exist. *See United States v. Bergh*, 352 U.S. 40, 47 (1956) (exclusion of statutory provision from Code is evidence of repeal). The Code may be overridden by the Statutes at Large, if the two conflict. *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964). *See* 1 U.S.C. § 112 ("Statutes at Large shall be legal evidence of laws . . . in all the courts of the United States."). In this case, however, the Statutes at Large confirm the codifiers' conclusion that Section 92 was repealed. Petitioners thus must overcome a strong presumption against their position that Section 92 exists.

To overcome this presumption, petitioners must make a convincing case that the 1918 Act did not in fact repeal Section 92. That issue, all parties agree, turns on whether the 1916 Congress enacted Section 92 as an amendment to Rev. Stat. § 5202. If so, as every court

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edging that repeal in 1915 may have been by "mistake"; Executive Order issued in 1966 filled gap). Indeed, in 1983, corrections to the Garn-St Germain Depository Institutions Act, Pub. L. No. 97-320, restored inadvertently omitted provisions of the Revised Statutes. *See* Sections 20 and 23 of Pub.L. 97-457, 96 Stat. 2509-2510 (1983) (Joint Resolution to "make technical corrections to certain banking and related statutes").

that has addressed the issue has concluded,[16] then Section 92 was repealed in 1918.

Petitioners fall far short of the mark. They have not made a plausible, much less a convincing, case that the 1916 Act placed Section 92 in Section 13 of the Federal Reserve Act rather than in Rev. Stat. § 5202. Indeed, their argument requires this Court to ignore unambiguous indications of congressional intent in favor of dubious inferences from offhand remarks in the legislative history and ambiguous post-enactment activity. At bottom, petitioners seek to divert this Court from the proper course of deciding what Congress did, in an effort to induce this Court to vindicate their vision of what rational 1916 and 1918 Congresses ought to have done.

A properly circumspect application of principles of statutory construction defeats petitioners' case. As will be demonstrated, the text of the 1916 Act (its language and punctuation) clearly places Section 92 within Rev. Stat. § 5202, and this placement is entirely consistent with the subject matter of the federal banking laws. Having been adopted as an amendment to Rev. Stat. § 5202, Section 92 was then repealed by the express language of the 1918 Act.

1. The Text Enacted by Congress and Approved by the President Unquestionably Proves Section 92's Repeal.

As petitioners concede, the quotation marks in the Statutes at Large make clear that Section 92 was added as an amendment to Rev. Stat. § 5202 in the 1916 Act and was repealed by the 1918 Act.[17] Gov't Br. at 14-15;

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[16] *See* 92-507 Pet. App. 8a-9a; *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 151-52 (2d Cir. 1992) (petns. for cert. pending); *see also Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 35 (1992) (adopting *American Land Title* opinion) (appeal pending).

[17] Those commentators who examined the issue in the mid-1950's agreed. *See Financial Institutions Act of 1957, Hearings Before*

Bank Br. at 15. In 1913, Congress enacted what was to become known as the "Federal Reserve Act." Pub. L. No. 63-43, § 13, 38 Stat. 251 (1913) (the "1913 Act").[18] The 1913 Act also amended Rev. Stat. § 5202. In making the amendment, the 1913 Act set forth the full text of the amended Rev. Stat. § 5202, prefacing the new law with the following statement:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

38 Stat. 264 (Resp. Ldg. 14). It is undisputed that this language amended Rev. Stat. § 5202, which was a part of the National Bank Act,[19] and *not* a part of the Federal Reserve Act. The two statutes were entirely separate and served different functions: The National Bank Act was focused narrowly on the establishment and government of nationally chartered banks; the Federal Reserve Act was broad-ranging legislation establishing the Federal Reserve system (made up of Federal Reserve Banks), designed to foster the flow of credit and money, through both state and national banks, to facilitate the Nation's orderly economic growth.

The 1916 Act revised several portions of the 1913 Act. It also enacted what came to be known as Section 92. The critical language of the 1916 Act, exactly as it appears in the Statutes at Large, begins with the phrase (without quotation marks):

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the Comm. on Banking and Currency, House of Representatives, on S. 1451 and H.R. 7026, 85th Cong., 2d Sess. 1023, 1037, 1064, 1065-66 (1958) ("*House Hearings*").

[18] *See* 92-507 Pet. App. 21a-22a. The 1913 Act is reproduced in full in Resp. Ldg. 1-25.

[19] Rev. Stat. § 5202 was based on Section 36 of the National Bank Act of 1864 (Act of June 3, 1864), ch. 106, § 36, 13 Stat. 99, 110. *See* Gov't Br. at 19 n.6. Other provisions of the National Bank Act appeared in other sections of the Revised Statutes. *See generally Twin City Nat'l Bank v. Nebecker*, 167 U.S. 196 (1897).

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

39 Stat. 753 (Resp. Ldg. 28). Each subsequent paragraph begins with a quotation mark but does not end with a quotation mark, until the paragraph following what became Section 92. 39 Stat. 753-54 (Resp. Ldg. 28-29). Such opening and closing quotation marks are the conventional and accepted style for defining the beginning and end of a multi-paragraphed body of text.[20] Thus, by its express terms as set out in the enrolled bill and Statutes at Large, the 1916 Act included Section 92 in the amended Rev. Stat. § 5202.

In 1918, Congress again amended and restated Rev. Stat. § 5202. Again, the critical language of the 1918 Act, as it appears in the Statutes at Large, begins:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

40 Stat. 512 (Resp. Ldg. 59). Each subsequent paragraph begins with a quotation mark but does not end with a quotation mark, until the paragraph adding an exemption for "Liabilities incurred under the provisions of the War Finance Corporation Act." *Id.* It is undisputed that Section 92 was not included in the 1918 restatement of Rev. Stat. § 5202.

On its face, the 1918 Act demonstrates that Section 92 was repealed. As the court of appeals concluded "the

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[20] *See, e.g.*, Manual of Style, § 89 (1910); The Chicago Manual of Style, § 10.25 at 289 (13th ed. 1982); Webster's Ninth New Collegiate Dictionary 968 (1988) (quotation mark is "used chiefly to indicate the beginning and the end of a quotation in which the exact phraseology of another or of a text is directly cited"); *Nashville Milk Co. v. Carnation Co.*, 238 F.2d 86, 89 (7th Cir. 1956) (use of quotation marks "is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress of the United States"), *aff'd*, 355 U.S. 373 (1958).

meaning of Section 92's omission is plain; material omitted on reenactment is deemed repealed." 92-507 Pet. App. 9a. It is a fundamental tenet of statutory construction that the phrase "amended to read as follows" indicates an intention to effect a complete substitution of text for the former law; all matter that is omitted from the amendment is considered repealed. 1A N. Singer, Sutherland Statutory Construction § 22.32 at 279 and § 23.12 at 355 (4th ed. 1985).[21] *See also Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 373 (1905) ("[I]t cannot in reason be said that the omission . . . gives rise to the implication that it was the intention of Congress to re-enact it."); *Murphy v. Utter*, 186 U.S. 95, 104-105 (1902) (language of statute that provided that a prior enactment "be, and is hereby, amended so as to read as follows . . . is not that of an amending act, but that of a repeated and substituted act"). Thus, the 1918 Act "by its terms" repealed those sections of Rev. Stat. § 5202 not repeated. *See Robertson v. Seattle Audubon Soc.*, 112 S.Ct. 1407, 1414 (1992). "[T]he intent to modify was not only clear, but express." *Id.* Furthermore, Congress specifically provided "[t]hat all provisions of any Act or Acts inconsistent with the provisions of [the 1918] Act are hereby repealed." 40 Stat. 515 (Resp. Ldg. 61). As set out in the 1916 Act, Rev. Stat. § 5202 was "inconsistent" with the 1918 Act in so far as it included material omitted from Rev. Stat. § 5202 as restated in the 1918 Act. Therefore, those inconsistent provisions, including Section 92, were expressly repealed by the repealing clause.[22]

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[21] *E.g., H. Rouw Co. v. Crivella*, 105 F.2d 434, 436 (8th Cir. 1939), *rev'd on other grounds*, 310 U.S. 612 (1940) (Congress enacted law curing effect of prior repeal); *Foreman v. United States*, 26 Cl.Ct. 553, 559 (1992); *United States v. Baker*, 189 F. Supp. 796, 801-02 (W.D. Pa. 1960), *aff'd* 293 F.2d 613 (3d Cir.), *cert. denied*, 368 U.S. 914 (1961); *United States v. One Ice Box*, 37 F.2d 120, 123 (N.D. Ill. 1930);

[22] Petitioners do not endorse the reasoning employed by the Second Circuit in *sua sponte* reaching its conclusion that Section 92 was not repealed. Indeed, none of the commentators who has examined the issue has agreed with the Second Circuit. In *American Land Title*, the Second Circuit concluded that, as the text clearly indicates, Congress enacted Section 92 as an amendment to Rev. Stat. § 5202 in the 1916 Act, and obviously omitted Section 92 when it restated Rev. Stat. § 5202 in the 1918 Act. 968 F.2d at 151-52. But the Second Circuit concluded that, contrary to their plain meaning, the words "amended to read as follows" do not effect a repeal of Section 92. *Id.* at 154. The Court noted that, in exceptional cases, the literal interpretation "'must yield where [its] application would be inconsistent with the purposes of the statute.'" *Id.* at 152, quoting *FTC v. Standard Motor Products, Inc.*, 371 F.2d 613, 617 (2d Cir. 1967). However, as the D.C. Circuit correctly observed, "[t]he inconsistency found in those . . . cases was one where the literal application of a statutory phrase . . . would have *frustrated* a clearly stated purpose of the amendments." 955 F.2d at 737 (emphasis added). There is no such *inconsistency* here: the elimination of national banks' power to sell insurance in small towns does not inherently contradict or interfere with the successful prosecution of the war (one stated purpose of the 1918 Act). In the end, the Second Circuit's decision is driven by the 1918 Congress' silence regarding the repeal of Section 92 and the court's "inference" that the omission of Section 92—*i.e.*, its apparent repeal—was the result of forgetfulness. 968 F.2d at 156. But neither of these factors justifies ignoring the literal effect of Congress' action. *See supra* pp. 12-13, *infra* pp. 32-33.

The Court relied on a similar analysis of Congress' use of quotation marks and introductory phrases in *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958). At issue in *Nashville Milk* was whether Section 3 of the Robinson-Patman Act provided a private right of action for treble damages. That question hinged on whether Section 3 was part of the Clayton Act. *Id.* at 376. The Court looked to the text of the Robinson-Patman Act and noted that one provision specifically stated "That Section 2 of the [Clayton Act] . . . *is amended to read as follows*: . . . ." *Id.*, citing the Statutes at Large (emphasis added). The Court observed that "The section then sets forth *in haec verba, and within quotation marks*, all the provisions of § 2, as modified by the amending language." *Id.* (emphasis added). Because Section 3 was *not* included "within the quotation marks" following

the phrase "is amended to read as follows," the Court held that "on its face" Section 3 could not be read as amending the Clayton Act. *Id.* In a companion case, the Court rejected a court of appeals' judgment that the placement of the quotation marks had no significance. *Safeway Stores v. Vance*, 355 U.S. 389 (1958) (reversing 239 F.2d 144, 146 (10th Cir. 1956), in reliance on *Nashville Milk*).

2. *The "Enrolled Bill Doctrine" Precludes This Court From Ignoring the Punctuation Based on Evidence Outside the Statute As Enacted.*

Petitioners urge this Court to pretend that the 1916 Congress had not signified its amendments to Section 5202 with quotation marks. According to petitioners, "there is strong evidence that Congress did not intend the quotation marks in the 1916 Act to have any interpretive effect." Gov't Br. at 20; *see* Bank Br. at 16. Based on earlier permutations of the legislation, petitioners argue, this Court should read the quotation marks out of the 1916 Act. The "enrolled bill doctrine" flatly precludes this Court from doing so.

The enrolled bill approved by the presiding officers of the Senate and House and signed by the President was punctuated as is the Statutes at Large, with quotation marks clearly indicating Section 92's placement within Rev. Stat. § 5202. Gov't Br. at 22 n.9 (examined enrolled bill at the National Archives); Bank Br. at 15. *See* Resp. Ldg. 32-39 (copy of enrolled bill from National Archives).[23] This enrolled bill is the definitive statement of the 1916 Act. It "carries on its face a solemn assurance by the legislative and executive departments of government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by congress." *Marshall Field Co. v. Clark*, 143 U.S. 649, 672 (1892).

> The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable.

Id. Courts are not free to gainsay the enrolled bill's official statement of the contents of the law. "The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated." *Id.; see United States v. Munoz-Flores*, 110 S. Ct. at 1978-79 (Scalia, J., concurring) (invoking enrolled bill doctrine).

The enrolled bill doctrine, as first explicated in *Marshall Field Co. v. Clark*, precludes courts from looking behind the enrolled bill for evidence of what Congress purportedly "intended" to enact. 143 U.S. at 670. Appellants in *Marshall Field*, like petitioners here, argued that legislative documents prior to the bill's enrollment demonstrated that the enrolled bill was incorrect (it allegedly had omitted a section of the statute). The Court did not question appellants' reading of the legislative materials, but found them irrelevant. The Court held that courts cannot look to "journals of either house, . . .

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[23] The Conference Committee's final report as reprinted in House and Senate records and in the Congressional Record also contains punctuation marks as they appear in the enrolled bill and Statutes at Large. *See Journal of the House of Representatives*, 994-95 (1916); *Journal of the Senate*, 625 (1916); 53 Cong. Rec. 13069-70 (1916) (Senate Conf. Rep.); 53 Cong. Rec. 13355 (1916) (House Conf. Rep.).

the reports of committees, or . . . other documents printed by authority of congress" for evidence that an enrolled bill is not what Congress intended to enact. 143 U.S. at 680. Pursuant to the enrolled bill doctrine, "the enrollment itself is the record, which is conclusive as to what the statute is, and cannot be impeached, destroyed, or weakened by the journals of parliament, or any other less authentic or less satisfactory memorials." *Id.* at 675 (internal quotation omitted). *Accord id.* at 674, 676, 677.

Accordingly, this Court must decline petitioners' invitation to rewrite the 1916 Act by eliminating its quotation marks. Principles of separation of powers and finality, which the enrolled bill vindicates, do not permit the Court to look to the legislative history petitioners invoke and conclude that the enrolled bill is wrong. The enrolled bill of the 1916 Act, signed by the leaders of the House and Senate and the President, used quotation marks to set off the "amended" Rev. Stat. § 5202 and included Section 92 within these quotations. This cannot be ignored.

3. *The "Comma Cases" Do Not Support Petitioners' Argument.*

Petitioners' reliance on cases in which courts have held that punctuation should not override the meaning of the words Congress used, where the two conflict, is entirely misplaced. *See* Gov't Br. at 20 and Bank Br. at 15.[24]

[24] *See United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83 (1932) (interpreting meaning of clause using comma so as to avoid constitutional problem); *Crawford v. Burke*, 195 U.S. 176, 192 (1904) (construing the meaning of a comma within text consistent with Congress' traditional usage); *Erie R.R. v. United States*, 240 F. 28, 32 (6th Cir. 1917) (concluding that a comma does not mean "or"). *Ewing v. Burnet*, 36 U.S. (11 Pet.) 41 (1837), is not germane, since the Court merely alluded to punctuation in a jury charge (*not* a statute) without setting out the charge or explaining the problem. *Taylor v. United States*, 495 U.S. 575 (1990), relied upon by the Bank, does not involve punctuation at all.

As an initial point, the *Shreveport* Court's remark that "punctuation marks are no part of an act," 287 U.S. 82, is obviously hyperbole. Punctuation can be a critical element in discerning the meaning of a statutory phrase. *See, e.g., United States v. Ron Pair Enterp., Inc.*, 109 S.Ct. 1026, 1030-31 (1989); *see also Crandon v. United States*, 110 S.Ct. 997, 1007 (1990) (Scalia, J., concurring); *United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979). What the Court has actually found is that, in interpreting statutory text in which the punctuation and words are inconsistent, the punctuation is a less reliable interpretative guide.

The "comma cases" on which petitioners rely differ critically from this case. The comma cases involve confusing language and punctuation. The statutes *as written by Congress* were susceptible of differing interpretations and the court, engaging in routine statutory construction, had to deem one or the other more plausible. Here, by contrast, the statute *as written by Congress* is perfectly clear and capable of only *one* meaning. The quotation marks are not inconsistent with the words. *See infra* pp. 24-25, 27-28. Indeed, the use of bracketing quotation marks to set off an amended section has no bearing on the meaning of the statutory provision; it is directed only toward its placement and is a device uniquely suited to that task.

This case is remarkably similar to *In re Schilling*, 53 F. 81 (2d Cir. 1892), which involved the placement of a parenthesis in the Tariff Act of 1890. It was alleged, based on comments made after the statute's enactment, that Congress had "made a mistake by ending the parenthesis in the wrong place." *Id.* at 83. But the court declined to construe the statute as if the parenthesis was placed where Congress allegedly intended it. Recognizing that punctuation "can be changed in accordance with the obvious intent of the legislature," the court ruled that "curved lines or brackets . . . designate much more distinctly than by use of commas the character of the clause

which is included." *Id.* The court declined to hold that "the declarations of the members of the committees [are] sufficient to authorize a court to change the manifest meaning of a statute as it passed the legislative body and received the approval of the president," concluding that "such a judicial construction of a statute is akin to judicial legislation, which, as congress has refused to act upon the subject, it is well to avoid." *Id.* at 83-84.

Here too, quotation marks clearly "designate . . . the character of the clause to be included" in Rev. Stat. § 5202. Here too, "apart from [the legislative history] . . . it could hardly be claimed that the intent of the statute plainly required a change in the punctuation." *Id.* at 83. And here too, "Congress has refused to act" to "correct" its allegedly mistaken repeal. Petitioners miscast this Court in a legislative role in urging it to ignore Congress' express text.

4. *Even Without the Punctuation Congress Enacted, the Language of the Statute Clearly Places Section 92 in Rev. Stat. § 5202.*

Even without the quotation marks, the language of the remaining text would unambiguously place Section 92 within Rev. Stat. § 5202. Congress used prefatory phrases within the 1916 Act as signposts: they were not intended as positive law, but rather to explain where the 1916 amendments were to be inserted in previously existing law. The introductory phrases appear sequentially in the text of the enrolled bill and Statutes at Large as follows:

> At the end of section eleven insert a new clause as follows: . . .
>
> That section thirteen be, and is hereby, amended to read as follows: . . .
>
> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: . . .

> That subsection (e) of section fourteen, be, and is hereby, amended to read as follows: . . .[25]
>
> • • • •

Section 92 follows the phrase introducing amendments to Rev. Stat. § 5202, and precedes the next prefatory phrase. Congress thereby expressly stated that Section 92 was enacted as part of the amended Rev. Stat. § 5202. The quotation marks, as they appear in the enrolled bill and the Statutes at Large, simply reinforce the meaning of the language of the 1916 Act. It is thus not surprising that this Court concluded in *Posadas v. National City Bank of New York*, 296 U.S. 497 (1936), that the 1916 Act "amends sections . . . of the Federal Reserve Act, *and section 5202 of the Revised Statutes.*" *Id.* at 502 (emphasis added). Petitioners ignore Congress' deliberate use of these introductory phrases.

C. Petitioners' Attempts to Introduce Ambiguity Into the Statutes Is Unavailing.

1. *Petitioners' Reading of the 1916 Act Renders Congress' Actions Meaningless.*

The "sense" petitioners seek to make out of the 1916 and 1918 statutes, in fact, does violence to the express statutory language of the 1916 Act and renders meaningless Congress' actions in 1918. In the 1916 Act, Congress stated, in no uncertain terms, that Rev. Stat. § 5202 "is hereby *amended* . . . ." 39 Stat. 753 (emphasis added). Yet, according to petitioners, Congress did *not* amend Rev. Stat. § 5202, but simply restated § 5202 as it existed pursuant to the 1913 Act. Gov't Br. at 19 n.5; Bank Br. at 21. Petitioners' reading, which ignores the express instruction given by Congress (that Rev. Stat. § 5202 is "amended"), violates the most fundamental tenets of statutory construction. *E.g., Reiter v. Sonotone*

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[25] 39 Stat. 752-754 (Resp. Ldg. 27-29). None of these introductory phrases was enclosed by quotation marks in the enrolled bill or Statutes at Large.

Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); *see also Freytag v. CIR*, 111 S.Ct. 2631, 2638 (1991) (expressing "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment").

Petitioners contend that in amending Section 13 of the Federal Reserve Act, the 1916 Congress "simply reprinted" the Rev. Stat. § 5202 from the 1913 Act and, inexplicably, included the introductory phrase stating that Rev. Stat. § 5202 "is hereby amended so as to read as follows." But Rev. Stat. § 5202 and the Federal Reserve Act are either separate statutory provisions or they are not. Petitioners seem to concede that they are—certainly no one has ever suggested otherwise. Indeed, Rev. Stat. § 5202 was part of the National Bank Act. Because they are separate and distinct, there was no need for the 1916 Congress to *restate* Rev. Stat. § 5202, *completely unchanged*, in order to amend only Section 13 of the Federal Reserve Act; it could have simply amended Section 13 without mentioning Rev. Stat. § 5202.

Petitioners' reading would also render the 1918 Congress' attempt to amend Rev. Stat. § 5202 a meaningless gesture. In the 1918 Act, Congress amended *only* Rev. Stat. § 5202—a statutory provision separate and distinct from the Federal Reserve Act—by adding an additional exemption. Under petitioners' theory, however, a provision identical to the earlier Rev. Stat. § 5202 would have remained imbedded in Section 13 of the Federal Reserve Act, which the 1918 Congress did *not* amend. The result of petitioners theory would be two different, and conflicting, versions of the text of Rev. Stat. § 5202.

The text of the 1916 Act expressly amended Rev. Stat. § 5202, as this Court concluded in *Posadas*. 296 U.S. at 502. It did not simply restate Section 5202 as it appeared in the 1913 Act. And as the text also shows, Section 92 was unquestionably included in the 1916 amendment.

2. *The Phrase "this Act" Does Not Necessitate Section 92's Placement in Section 13 of the Federal Reserve Act.*

Having ignored Congress' use of quotation marks and introductory phrases, petitioners seek to create textual ambiguity by focusing on Congress' use of the phrase "this Act" in the paragraph *preceding* Section 92 in the 1916 Act to refer to the Federal Reserve Act. *See* 39 Stat. 753 (Resp. Ldg. 28). Even if true, this argument proves little.[26] The meaning of "this Act" has no significance as to whether Section 92 was made part of Rev. Stat. § 5202 or part of Section 13 of the Federal Reserve Act.

It is not necessary that the paragraph preceding Section 92 be placed in Section 13 of the Federal Reserve Act, rather than in Rev. Stat. § 5202, in order for the use of the phrase "this Act" to make sense. If the paragraph preceding Section 92 was inserted in Rev. Stat. § 5202 (as it was), "this Act" would mean the Federal Reserve Act because the paragraph immediately before it explicitly identifies "the Federal reserve Act." *Id.* No other Act of Congress is mentioned, and Rev. Stat. § 5202 is not itself an "Act." Consequently, "this Act" could only refer to the previously identified Federal Reserve Act.[27] Petitioners do not dispute that this is the natural reading of the usage.

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[26] The paragraph preceding Section 92 in the 1916 Act grants the Federal Reserve Board authority to regulate the "discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances *authorized by this Act.*" 39 Stat. 753 (Resp. Ldg. 28) (emphasis added). The discount and rediscount authority was first granted in the second and third paragraphs of Section 13 of the 1913 Federal Reserve Act, 38 Stat. 263-64 (Resp. Ldg. 13-14), and was revised in the second and fourth paragraphs of Section 13 of the 1916 Act, 39 Stat. 752 (Resp. Ldg. 27).

[27] *See* Webster's Ninth New Collegiate Dictionary 1227 (ed. 1988) ("This" means "the . . . thing, or idea . . . that has just been mentioned.").

Whether the paragraph in question was to be located in Rev. Stat. § 5202 or in Section 13 of the Federal Reserve Act, "this Act" would mean "the Federal Reserve Act." Thus, the phrase "this Act" has no bearing on the placement of the paragraph preceding Section 92 or Section 92 itself.[28]

3. *The Title of the 1916 Act Does Not Demonstrate That Section 92 Was Placed in Section 13 of the Federal Reserve Act.*

Petitioners also seek to use the title of the 1916 Act to create ambiguity, because the title did not specifically mention that Rev. Stat. § 5202 was being amended.[29] But "it is well settled that the heading of a statute, or section thereof, may not be used to create an ambiguity or to extend or restrict the language contained in the body of the statute itself." *Bersio v. United States*, 124 F.2d 310, 314 (4th Cir. 1941) (emphasis added), *cert. denied*, 316 U.S. 665 (1942). As the Supreme Court explained the year the 1916 Act was enacted:

> [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designated names or reports accompanying their introduction, or from any extraneous source.

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[28] Thus, it is irrelevant to the issue at hand that, in other sections of the 1916 Act, Congress similarly used the phrase "this Act" to refer to the Federal Reserve Act. *See* 92-507 Pet. App. 83a (paragraph beginning "'(m)'"), 84a (first full paragraph); Gov't Br. at 17 n.4; Bank Br. at 12-13. Those other usages lend support to the reading of "this Act" in the paragraph preceding Section 92 as referring to the Federal Reserve Act, but that is not at issue. The question is whether the reference evidences whether Section 92 was placed in Rev. Stat. § 5202 or Section 13 of the Federal Reserve Act, which it does not.

[29] The title is "An Act To amend certain sections of the Act entitled 'Federal reserve Act,' approved December twenty-third, nineteen hundred and thirteen." 39 Stat. 752 (Resp. Ldg. 27).

Caminetti v. United States, 242 U.S. 470, 490 (1916). The "detailed provisions" of the 1916 Act demonstrate that Congress enacted Section 92 as an amendment to Rev. Stat. § 5202. The title of the 1916 Act cannot override the text. *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947).

In any event, the title of the 1916 Act is uninstructive. Failing to mention an amendment in a title was not an uncommon practice. Indeed, the titles of the 1913 and 1918 Acts did not mention that they were each making amendments to Rev. Stat. § 5202, although it is undisputed that each Act effected such an amendment.[30] As this Court has explained, "[t]hat the heading of [a statute] fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact." *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. at 528.[31]

4. *The Subject Matter of the Statutes Involved Is Consistent With Section 92's Placement in Rev. Stat. § 5202.*

Finally, petitioners leave the language used by Congress entirely for a foray into the "substance" of federal banking law. They suggest that Congress must have intended to place Section 92 in Section 13 of the Federal Reserve Act because, according to petitioners, there was no reason to put it in Rev. Stat. § 5202. But asserting

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[30] *See* 38 Stat. 251 (Resp. Ldg. 1); 40 Stat. 506 (Resp. Ldg. 53). As the 1913 and 1918 Acts demonstrate, the federal petitioners are wrong that "the practice of the day was to make such a specification [that the statute was amending a provision of the Revised Statutes] if an amendment to the Revised Statutes was contained in the body of the statute." Gov't Br. at 12.

[31] Moreover, the title of the 1916 Act did encompass amendments to Rev. Stat. § 5202. The title declares that the 1916 Act amends the 1913 Federal Reserve Act. *See* 39 Stat. 752 (Resp. Ldg. 27). The 1913 Act included a fully revised Rev. Stat. § 5202. Thus, amendments to the 1913 Act might well include an amendment to Rev. Stat. § 5202, and did.

the negative does not prove the affirmative. Petitioners advance no reason why Section 92 would have been more appropriately inserted in Section 13 of the Federal Reserve Act. There is no obvious relationship between the two provisions. To the contrary, Section 92 concerned insurance agency and real estate brokerage powers of "national bank associations," whereas Section 13 dealt with the traditional banking powers of "federal reserve banks" (which were different and distinct entities from national banks). Thus, contrary to petitioners' contention, the "subject matter of the banking statutes at issue" does *not* demonstrate that "Section 92 initially belonged in [Section 13 of] the Federal Reserve Act." Bank Br. at 19; *see* Gov't Br. at 19-20.[32]

Indeed, the opposite conclusion is more likely. Rev. Stat. § 5202 was codified as part of the National Bank Act. *See supra* n.19. The National Bank Act is the primary statute defining and limiting the powers of national banks. Thus, not surprisingly, then-Comptroller Williams specifically proposed Section 92 as an amendment to the National Bank Act. The 1916 Congress implemented the Comptroller's recommendation, without discussion, debate, or significant change. *See supra* p. 3 & n.4. No one disputes that Section 92, if it still exists, exists as part of

[32] The Bank speculates that "[a]s Congress was creating entirely new authority for national banks by enacting Section 92, it would have decided that amendment of an existing section of the Revised Statutes was impracticable." Bank Br. at 22 n.26. However, the Bank has no explanation as to why Congress would have thought it more "practicable" to amend an existing section of the Federal Reserve Act that not even petitioners contend had anything to do with the subject matter of Section 92. What might have been most "practicable" would have been to create an entirely new and separate statutory provision, but no one contends Congress did so. The Bank suggests that the 1916 Congress would naturally use the existing legislative vehicle of the Federal Reserve Act, amendments to which it was considering when the Comptroller made his suggestion. Bank Br. at 22. But that simply begs the question. Congress obviously inserted Section 92 in the 1916 Act; the issue is whether that Act amended Rev. Stat. § 5202 as well as the 1913 Federal Reserve Act.

the National Bank Act. Thus, if any inference is to be drawn from the "substance" of the 1916 Act, it is that Section 92 was an amendment to Rev. Stat. § 5202.

D. No Extrinsic Evidence Negates the Conclusion Necessarily Drawn From the Text of the Enrolled Bill and Statutes at Large: Congress Repealed Section 92 in 1918.

This Court has explained that "[g]oing behind the plain language of a statute in search of a possibly contrary Congressional intent is 'a step to be taken cautiously even under the best of circumstances.'" *United States v. Locke*, 471 U.S. 84, 95 (1985), *quoting American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982). *See, e.g., Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992); *Freytag v. CIR*, 111 S.Ct. at 2636; *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). At most, this Court should examine whether there is *clearly expressed* legislative intent to the contrary. Only if a "literal application of a statute will produce a result *demonstrably at odds* with the intentions of its drafters" should a court rely on its view of the drafters' intent. *Griffin*, 458 U.S. at 571 (emphasis added); *accord, e.g., Union Bank v. Wolas*, 112 S.Ct. 527, 530 (1991); *Ardestani v. INS*, 112 S.Ct. 515, 520 (1991); *Demarest v. Manspeaker*, 111 S.Ct. 599, 604 (1991); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). This is an extremely heavy burden. Legislative silence cannot satisfy the burden, nor can snippets of legislative history that do not mandate an interpretation contrary to the language Congress enacted. Subsequent actions of regulators and legislators are of negligible or no weight.

Petitioners have not met their burden here. As in *Ullman v. United States*, "[t]he most that can be said for the legislative history is that it is on the whole inconclusive. Certainly, it contains nothing that requires the court to reject the construction which the statutory language clearly requires." 350 U.S. 422, 433 (1956). Noth-

ing in the extraneous evidence on which petitioners rely demonstrates a congressional intent inconsistent with the text of the 1916 and 1918 Acts.

1. *Congressional Silence Cannot Demonstrate an Affirmative Intention Not to Repeal Section 92.*

There is no relevant express statement of Congress' intent anywhere in the legislative history. The only mention of the placement of Section 92 is Comptroller Williams' recommendation that it be added as an amendment to the National Bank Act, of which Rev. Stat. § 5202 was a part, 53 Cong. Rec. 11001 (1916), and Senator Owen's proposal that Section 92 be inserted in the bill that became the 1916 Act after the introductory clause indicating an amendment to Rev. Stat. § 5202, *id.* at 11153. Both support a literal reading of the text. The 1918 Act's legislative history is utterly silent regarding Congress' intention to preserve or repeal Section 92.

Lacking any clear statement of congressional intent, petitioners are reduced to the untenable argument that what a later Congress did *not* say demonstrates what an earlier Congress meant to do. According to petitioners, the 1918 Congress' failure to state why it believed Section 92 should be repealed proves that *the 1916 Congress* did not intend to place Section 92 in Rev. Stat. § 5202. *See* Gov't Br. at 23-26; Bank Br. at 25. If the expressed views of a later Congress "form a hazardous basis for inferring the intent of an earlier one," *Russello v. United States*, 464 U.S. 16, 26 (1983), the silence of a later Congress forms no basis at all.

Petitioners' attempt to create ambiguity in the 1916 statute by pointing to silence in the legislative history of the 1918 Act "read[s] much into nothing." *Albernaz v. United States*, 450 U.S. 333, 342 (1981). As this Court has instructed, "[o]rdinarily, 'Congress' silence is just that—silence.'" *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989), quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). Congress does not have an affirmative duty to explain to the Court

why it deems a particular enactment wise or necessary, or to demonstrate that it is aware of the consequences of its action:

> [I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

Harrison v. PPG Indus. Inc., 446 U.S. 578, 592 (1980); *accord, e.g., Albernaz*, 450 U.S. at 341.[33]

2. *Subsequent Actions by Congress, the Comptroller and the Courts Cannot Revive a Repealed Statute.*

Petitioners agree that the subsequent actions of Congress, the courts, the Comptroller and the Federal Reserve Board "cannot revive a statute whose text clearly indicates its repeal." Gov't Br. at 31; *see* Bank Br. at 26. That is the end of the matter, for, as demonstrated above, the text of the enrolled bill and Statutes at Large clearly indicates that Section 92 has been repealed.

a. Nevertheless, petitioners argue that there is ambiguity and that the best guide to resolving that ambiguity is the agencies' contemporaneous construction of the statute. Gov't Br. at 31-32; Bank Br. at 26. Even assuming ambiguity exists here—and it does not—the evidence petitioners muster does not lead to the conclusion that Section 92 still exists.

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[33] Petitioners observe that neither Senator Owen nor Comptroller Williams complained that the 1918 Act would repeal Section 92. But Congress barely discussed Section 92 when it was enacted in 1916. Senator Owen simply explained that he had altered the Comptroller's recommendation from a town of less than 3,000 to a town of less than 5,000, at the behest of another Senator, and said that "[t]he matter is unimportant either way." 53 Cong. Rec. 11153 (1916). Thus, Congress does not appear to have been concerned one way or the other with the authority of national banks to sell insurance in small towns.

As an initial matter, there is no support for deferring to the views of the Comptroller or Federal Reserve Board as to Section 92's placement or repeal.[34] This Court has never held that an agency's view of whether Congress enacted or repealed a statutory provision is entitled to deference. It is one thing to defer to an agency's view on how a particular statute that it administers should be interpreted or applied when there is a gap or ambiguity in existing statutory language. After all, the agency presumably has particular expertise regarding the workings of that regulatory arena and constitutional authority to execute the laws Congress enacts. *See e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Bureau of Alcohol, Tobacco & Firearms v. FLRB*, 464 U.S. 89, 97-98 & n.8 (1983); *Ford Motor Credit Co. v. Mihollin*, 444 U.S. 555, 556 & n.9 (1980). However, no agency expertise comes into play in judging whether Congress did or did not repeal a statutory provision.[35] That judgment is assigned by the Constitution to the judiciary. To defer to agencies in this context would be to grant them power not contemplated by the Constitution. *See Dixon v. United States*, 381 U.S. 68, 74 (1965).

In any event, the "contemporaneous" view of the Comptroller, who was charged with implementing Section 92,

[34] In any event, an agency's interpretation of a statute receives no deference where, as here, it is at odds with the statute's plain text. *E.g., Demarest v. Manspeaker*, 111 S.Ct. 599, 603 (1991); *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct. 2854, 2863 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself [e]ven [if] contemporaneous and longstanding"); *SEC v. Sloan*, 436 U.S. 103, 117 (1978) (no deference even if interpretation "has been both consistent and longstanding").

[35] *Compare Bankamerica Corp. v. United States*, 462 U.S. 122 (1983) (agency's apparent interpretation of substantive provision of Clayton Act). If any "agency"-like body is entitled to deference in this context based on its expertise, it is the Office of the Law Revision Counsel, which in assembling the U.S. Code, determined that Section 92 has been repealed.

was that the 1916 Act made Section 92 a part of Rev. Stat. § 5202—not a part of the Federal Reserve Act. The Comptroller's 1917 compilation of federal laws pertaining to national banks located Section 92 as part of Rev. Stat. § 5202, with marginal notes indicating that Section 92 had been added to Rev. Stat. § 5202 by the 1916 Act. *See* S. Doc. No. 412, 64th Cong., 1st Sess. 83 (1917) (Resp. Ldg. 50).[36] *See also* S. Doc. 216, 66th Cong., 2d Sess. 7 (1920) (post-1918 Act Comptroller compilation describing the 1916 Act as amending Rev. Stat. § 5202). Thus contemporaneous agency views support the conclusion that Congress enacted Section 92 as an amendment to Rev. Stat. § 5202.[37] Publication of this compilation by

[36] The Comptroller's additional printing of 5202 elsewhere in the compilation is fully consistent with Section 92's placement within Rev. Stat. § 5202. In the section of the compilation setting out the Federal Reserve Act, the Comptroller included, as a separately headed section, the full text of Rev. Stat. § 5202 (including Section 92) as it was stated in the 1916 Act. That is, the section begins by stating "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows." *Id.* at 136-137 (Section 613c) (Resp. Ldg. 52). What follows includes Section 92. The natural reading is as stating the entirety of the newly amended Rev. Stat. § 5202 (which was created by the 1916 Act)—an understanding confirmed by looking to the separate section of the compilation that printed the amended Rev. Stat. § 5202 to include Section 92, but without the introductory phrase. *Id.* at 83 (Resp. Ldg. 50). No matter which section of the Comptroller compilation a member of Congress consulted, Section 92 appeared as a part of Rev. Stat. § 5202.

In its report covering operations for the year 1916, the Federal Reserve Board simply set out the full text of the 1916 Act, offering no indication as to whether it believed Section 92 was part of an amendment to Rev. Stat. § 5202 or not. "Third Annual Report of the Federal Reserve Board," at 134-139 (1917). *See also* Federal Res. Bd., *The Federal Reserve Act As Amended* 27-28 (1917) (setting out 1916 Act as it appears in Statutes at Large, including quotation marks). That text, as demonstrated above, shows that Section 92 was enacted as an amendment to Rev. Stat. § 5202.

[37] The fact that the Comptroller has since issued regulations implementing Section 92 does not attest to the agency's authority to do so. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275,

the Senate Committee on Banking and Currency further supports the inference that Congress (or at least the committee that oversaw banking issues) believed the same.

It is this document to which the federal petitioners claim an interested member of the 1918 Congress would have turned in assessing the impact of the 1918 Act. *See* Gov't Br. at 27-28. Whether a member would have consulted anything other than the Statutes at Large is unclear. But since the Comptroller compilation, like the two privately published services to which the court of appeals referred,[38] clearly placed Section 92 within Rev. Stat. § 5202, those members who consulted it would logically have assumed that Section 92 would be repealed by the 1918 Act.[39]

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287 n.5 (1978) (Powell, J., concurring). Agency actions have only such effect as Congress gives them. Agencies do not have the power to make law, only to adopt regulations that carry out the law. *SEC v. Sloan*, 436 U.S. at 117-119; *Dixon v. United States*, 382 U.S. 68, 73-74 (1965). The existence of prior administrative practice, even if longstanding and well-explained, does not relieve the court of the responsibility to determine independently whether the practice is consistent with the Acts of Congress. *Sloan*, 436 U.S. at 118-119.

[38] *See* 9 U.S. Comp. Stat. Ann. § 9764 (West 1916) (Resp. Ldg. 40-43); 3 U.S. Stat. Ann. § 5202 (T.H. Flood & Co. 1916) (Resp. Ldg. 44-48). Every extant source of law showed Section 92 as an amendment to Rev. Stat. § 5202.

[39] The drafters of the 1916 Act could not have assumed on the basis of the Comptroller compilation that Section 92 would continue in existence however Rev. Stat. § 5202 was amended. *See* Gov't Br. at 28. As explained above, *supra* p. 26, if Congress had relied on the Comptroller compilation as petitioners understand that document—that is, as including Section 5202 as a subpart of Section 13 of the Federal Reserve Act (as opposed to a separate and distinct statutory provision)—Congress would have been impelled to amend both Section 5202 *and* the Federal Reserve Act in 1918 (which it did not do). The Comptroller compilation published after the 1918 Act demonstrates this point. The document shows Rev. Stat. § 5202 as stated in the 1918 Act—removing Section 92. *See* S. Doc. 216, 66th Cong., 2d Sess. 83 (1920). Recognizing that the 1918 Act did not amend Section 13 of the Federal Reserve Act, the compilation does not print the 1918 added exemption within Section 13, but instead drops a footnote referring to the 1918 Act. *Id.* at 146 & n.2.

b. Courts have no greater power than agencies to reenact a repealed statute. In any event, contrary to the Bank's assertion, there has been no "judicial position regarding the validity of Section 92." Bank Br. at 31. The D.C. Circuit was the first court to squarely address and resolve whether Section 92 exists. Other courts, including this Court, had, at most, noted Section 92's absence from the U.S. Code, but simply "assumed" its existence. *See, e.g., Commissioner of Internal Revenue v. First Sec. Bank*, 405 U.S. 394, 401-02 & n.12 (1972); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1261 & n.6 (5th Cir. 1980); *Commissioner of Internal Revenue v. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966).

In *First Security Bank*, for instance, the Court considered whether the IRS could allocate insurance income (under 26 U.S.C. § 482) from subsidiaries to the national banks that controlled them. The Court held that the banks, who claimed they believed that Section 92 forbade them to earn income from the sale of insurance, were not free to shift this income and therefore the IRS could not allocate it to them. The Court did not interpret Section 92. In fact, the Court made clear that it was *not* addressing Section 92's effect. The Court explicitly noted the controversy over the existence of Section 92. *Id.* at 401 n.12. However, the Court concluded that, given the banks' position, it would simply "[*a*]*ssume for purposes of* [*its*] *decision* that the Banks were prohibited from receiving insurance-related income." *Id.* at 402 (emphasis added).[40] Justices Blackmun and White, dissenting

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[40] The Bank misleadingly suggests that the Court deferred to the Comptroller's view that Section 92 continues to exist. *See* Bank Br. at 30, citing *First Security*, 405 U.S. at 403 n.16. The Court did nothing of the kind. In the cited footnote, the Court deferred to the Comptroller's interpretation of federal law generally as permitting national banks to make credit insurance available to their customers. The discussion had no relation to Section 92.

from the interpretation of 26 U.S.C. § 482, expressed the view that whether Section 92 "is still in effect [is] a proposition which may not be free from doubt." *Id.* at 418 (Blackmun, J., dissenting). *See also id.* at 419, 426 (referring to "the missing § 92").

c. The apparent assumption of Congresses in the 1980's, by purporting to amend or suspend Section 92, that the statutory provision had not been repealed, provides no support for petitioners' argument.[41] The views of a subsequent Congress are of "very little, if any, significance" in interpreting legislation enacted by an earlier Congress. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968). *Accord, e.g., Consumer Prod. Safety Comm'n*, 447 U.S. at 117-18; *United States v. Price*, 361 U.S. 304, 312 (1960); *United States v. United Mine Workers*, 330 U.S. 258, 282 (1947). But "all courts hold that a repealed act cannot be amended. No court will give the attempted amendment the effect of reviving the repealed act." 1A N. Sand, Sutherland Statutory Construction § 22.03 at 173 (4th ed. 1985).

Subsequent legislatures cannot breathe life into a nonexistent statute retroactively; at most, they can give it vitality as a new act by positively re-enacting it. *Town of South Ottawa v. Perkins*, 94 U.S. 260, 269-70 (1877). But here, as in *Perkins*, the Legislature did not profess to do so.[42] The Court's ruling in *Perkins* is on point:

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[41] *See* Garn-St Germain Depository Institution Act of 1918, Pub. L. No. 97-320, § 403(b), 96 Stat. 1510-11 (purporting to amend Section 92 by striking the non-insurance agency portion of the provision); Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 201(b)(5), 101 Stat. 583 (purporting to place a moratorium on Section 92 insurance activities).

[42] No one suggests that the 1980s laws, *see supra* n.41, re-enacted Section 92. *See, e.g.*, S. Rep. No. 536, 97th Cong., 2d Sess. 60, *reprinted in* 1982 U.S. Code Cong. & Admin. News 3054, 3114 (explaining that Garn-St Germain Act Depository Institutions Act of 1982 simply "deletes the existing reference [in Section 92] to the authority of national banks . . .").

> The most that can be said is that in referring to the [earlier Act], the Legislature inadvertently supposed that it [was valid]. Whether such inadvertence was the result of a false suggestion, by interested parties or otherwise, is of no consequence. . . . To give to such a reference in a subsequent Act, as is here relied upon, the effect of validating or reviving or vitalizing a void or repealed statute, when no such intention is expressed, would be dangerous and would lay the foundation for evil practices.

Id. at 270. *See also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963) (construction of Section 7 of the Clayton Act not foreclosed by fact that Congress' misunderstanding of its scope may have played some part in passage of Bank Merger Act).

d. Furthermore, subsequent actions of the Congress and the courts have not been "utterly inconsistent" with the conclusion of repeal. Gov't Br. at 29. The construction of the 1916 and 1918 Acts has been far from "uniform." Bank Br. at 26.

During the late 1950's the issue of Section 92's repeal was the subject of considerable debate in Congress, especially during the House's consideration of a bill that would have treated Section 92 as existing law. In 1957, Congressman Patman, a member (and future Chairman) of the House Banking Committee, argued forcefully that Section 92 had been repealed. *House Hearings* at 989-90, 1060-63. Congressman Cellar, Chairman of the House Judiciary Committee, supported by counsel for the Subcommittee on Revision and Codification of the Laws, agreed. Relying on the plain meaning of the text of the 1916 and 1918 Acts, Celler testified that "[i]t is clearly indicated that [Section 92] has been repealed. There is no question about it." *Id.* at 1501. Celler rejected the arguments now reiterated by petitioners here:

> An unambiguous enactment is the law. The United States Code is prima facie evidence of what the law

> is. The various contentions that have been made, to the effect that [Section 92] was never repealed, all run afoul of these unassailable principles. More than mere doubt and conjecture are required to overcome the force of law, or to overcome the official prima facie statement of it.

Id. at 1503. This dispute also prompted submissions by the Comptroller, counsel for the House Banking Committee, counsel for the Advisory Committee for the Study of Federal Statutes Governing Financial Institutions and Credits, and the Library of Congress's Legislative Reference Service. *Id.* at 1010-25, 1036-40, 1063-71.[43] After receiving these views, the House Committee on Banking offered no formal judgment on Section 92's validity. *See, e.g., id.* at 1090, 1199 (comments of Sen. Betts, expressing view that no one on committee can say "that it is or is not the law"; comments on Sen. Patman, expressing view that "it is not the law"). And the provision that would have treated Section 92 as existing law was not enacted.

Seven years later, however, the staff of a House Banking subcommittee reached the conclusion that "Section 92 is non-existent."[44] And in 1988, the Senate passed a bill amending the National Bank Act and including a *new* section that would have duplicated Section 92 (if it had existed) with more explicit limitations. But the bill made no reference to Section 92 or provision for its amendment, replacement or repeal, thus suggesting the view

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[43] The latter memorandum took no position as to the existence of Section 92, but rather "attempt[ed], under a very short deadline, to state the pertinent facts." *Id.* at 1063. The other submissions echoed the arguments made by petitioners here.

[44] *Consolidation of Bank Examining and Supervisory Functions, 1965: Hearings on H.R. 107 and H.R. 6885 before the Comm. on Banking and Currency of the House of Representatives, Subcomm. on Bank Supervision and Insurance*, 89th Cong., 1st Sess. 3, 391 (1965).

that Section 92 was not in effect.[45] The bill was not enacted. No post-1918 Congress has re-enacted Section 92.

e. The Bank's complaint that the banking community has relied upon Section 92's existence for decades is beside the point. *See* Bank Br. at 31. As Judge Sentelle correctly observed:

> The passage of time, the acquiescence of the parties, the assumptions of officials, even all taken together cannot enact a statute. Legislation only comes into existence through bicameral congressional enactment and presentment to the President of the United States. . . .

92-507 Pet. App. 37a (concurring in denial of rehearing *en banc*). And whatever reliance the banks have placed has been in the face of Section 92's omission from the U.S. Code for more than 40 years, repeated questions about Section 92's continued existence, and the absence of any court ruling resolving the issue. This Court can serve the banks' purported commercial reliance interests only by judicially re-enacting Section 92. And no reliance interest, however strong, can justify the Court's assumption of legislative power.

II. THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THE VALIDITY OF SECTION 92.

The court of appeals plainly had the authority to decide whether Section 92 exists. The federal petitioners concede that the court was not "powerless to resolve the question [of Section 92's validity] if it chose to do so" and may not even "have had the *discretion* to refuse" to decide it. Gov't Br. at 14 n.3 (emphasis in original). They recognize that the court's application of the law governing the controversy before it—even though its analysis of that law differed from that offered by any

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[45] The Proxmire Financial Modernization Act of 1988, Section 513B, reprinted in 134 Cong. Rec. S3541 (1988).

party—was fully consistent with the standards established by this Court. *See id.* A contrary position would leave federal courts in an untenable position: parties could preclude a court from deciding a claim on the correct legal grounds by insisting that the court resolve the claim on grounds more favorable to the parties' overall interests. The federal courts are not captive to such manipulation.

The Bank premises its disagreement on two representations: that the D.C. Circuit's resolution of the validity of Section 92 was an improper advisory opinion, and that the validity of Section 92 was a separate claim that respondents had affirmatively waived. Bank Br. at 31-35. Neither characterization is apposite.

A. The Court of Appeals Decided A Concrete Case or Controversy.

Respondents' suit—a challenge to the Comptroller's power to issue its approval to the Bank—was the "pursuance of an honest and actual antagonistic assertion of rights by one [party] against another." *Muskrat v. United States*, 219 U.S. 346, 359 (1911). Respondents brought the suit to enforce law that limits national banks' sale of insurance. Petitioners defended the suit so that national banks might be permitted to engage in this commercial undertaking. The facts before the court of appeals were not hypothetical and its decision did not just offer advice. The contested agency ruling issued; the economic position of respondents' members was threatened by it; and the decision, if affirmed, will have the concrete effect of forcing the Comptroller to rescind the ruling.[46]

The question decided by the court of appeals thus fits exactly this Court's definition of an Article III case or

[46] *Compare Princeton University v. Schmid*, 455 U.S. 100, 102 (1982) (appellant specified it did not prefer one outcome to another); *Muskrat*, 219 U.S. at 361 (defendant had no interest adverse to the claimants).

controversy. The "valuable legal rights asserted by the [respondents] and threatened with imminent invasion by [petitioners], will be directly affected to a specific and substantial degree by the decision of the question of law." *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249, 262 (1933). In *Nashville*, this Court held that the case before it was not an attempt to secure an advisory opinion because the decision would determine the appellant's duty to pay tax. *Id.* Likewise, the court of appeal's decision that Section 92 was repealed determined the Comptroller's power to issue the approval given the Bank, and the Bank's ability to rely on that approval in venturing into a new business. Accordingly, there was no Article III bar to the court of appeals' decision.[47]

B. The Court of Appeals Decided A Claim That Was Already Before It.

The invalidity of Section 92 is not a discrete and unasserted claim, as the Bank contends, but a question "antecedent to . . . and ultimately dispositive of" the claim squarely presented by respondents. *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990). Respondents' claim was that the Comptroller violated Section 702(2)(A) of the Administrative Procedure Act in issuing an approval not authorized by Section 92, the sole

[47] The Bank's reliance on *Williams v. Zbaraz*, 448 U.S. 358 (1980), is misplaced. Contrary to the Bank's representations, *see* Bank Br. at 34, *Zbaraz* did not even suggest that the parties' failure to challenge a federal statute as invalid precludes federal courts from considering the question. *Zbaraz* held that a federal court granting all the relief asked for, by striking down a state statute as unconstitutional, has no cause to ransack through the statute books to find other provisions that would succumb to the same constitutional defect if challenged. *Id.* at 367. The court of appeals' resolution of the validity of Section 92 was not the result of a foraging expedition. The parties had asked the court to construe Section 92. The court justifiably chose to ascertain whether the statute existed before expending judicial resources on its interpretation.

authority on which the Comptroller relied.[48] Respondents thus "effectively invoked" Section 702(2)(A) "as the basis of [their] right to" have the unauthorized ruling rescinded, and the case was decided on that basis. *See Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1718 (1991).

In deciding respondents' claim, however, the court of appeals analyzed Section 92's inadequacy as the Comptroller's source of power differently than had respondents, just as this Court in *Kamen* analyzed the applicable federal common law rule differently than had the plaintiff. *See id.* at 1718-1723. Respondents argued that the terms of Section 92 do not permit the Comptroller to issue such a ruling. The court instead found that Section 92 does not authorize the ruling because it no longer exists.

This Court addressed a near-identical situation in *Arcadia*. Although the parties had argued their positions on the basis of specific interpretations of § 318 of the Federal Power Act, this Court unanimously chose to decide the case on the ground that § 318 did not govern the dispute. 111 S. Ct. at 418. No party had made this argument at any point in the proceedings.[49] Nonetheless, the Court, realizing that the inapplicability of § 318 to the agency orders at issue was an alternative argument, rather than a separate claim, *sua sponte* developed an analysis of the law "dispositive of the present dispute." *Id.* Here, the claim before the court of appeals turned on what Section 92 authorized, and the court determined that an analysis of the law not pressed by any party—

[48] *See* NALU *et al.* Complaint, ¶ 19 (Resp. Ldg. 63-64); IIAA, *et al.* Complaint ¶ 19 (Resp. Ldg. 67).

[49] *See Arcadia*, 111 S. Ct. at 418; *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1658 (1991) (Stevens, J., dissenting) (noting that *Arcadia*, was decided "on an issue that not only was not raised below or in any of the papers in this Court, but that also was not raised at any point during oral argument before the Court").

the non-existence of Section 92—was dispositive of this claim.[50]

C. The Court of Appeals Has Discretion to Apply the Law Governing Claims Before It Whether or Not a Party Urges a Correct View of That Law.

Having undertaken to decide whether Section 92 authorized the Comptroller's ruling, the court of appeals was "not limited to the particular legal theories advanced by the parties, but rather retain[ed] the independent power to identify and apply the proper construction of governing law." *Kamen*, 111 S. Ct. at 1718, citing with approval *Lamar v. Micou*, 114 U.S. 218, 223 (1885) ("The law . . . is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof."). The Bank's assertion that respondents' initial failure to argue Section 92's invalidity operates as a waiver or forfeiture of this legal theory has been

[50] In any event, the court of appeals could have addressed the invalidity of Section 92 even if it had been a separate claim. The absence of Section 92 from the U.S. Code established a prima facie case that the section had ceased to exist. *See* 1 U.S.C. § 204(a). Courts "need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it." *United States v. Burke*, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring); *see also McCormick v. United States*, 111 S. Ct. 1807, 1814 n.6 (1991) (acknowledging the plain error doctrine); *Hormel v. Helvering*, 312 U.S. 552, 556-7 (1941) (upholding an appellate court's decision to enforce a tax based on a tax section not relied upon by the government below because "injustice might otherwise result").

The Bank overstates these doctrines when it suggests that only errors "beyond any doubt" are plain and only extraordinary circumstances constitute "injustice." Bank Br. at 33. The "plain errors" reversed by appellate courts are not undisputed; at the very least, each was considered an accurate decision by the trial judge. Likewise, *Hormel*'s "injustice" was simply an incorrect resolution of the case. The error of the district court's finding that the Comptroller's ruling was authorized by Section 92 met both standards: Section 92 is plainly absent from the U.S. Code, and relying on a non-existent statute to validate agency action is unjust.

rejected by this Court: "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law . . . is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties." *Town of South Ottawa v. Perkins*, 94 U.S. at 267. As the *Perkins* Court explained:

> It would be an intolerable state of things if a document purporting to be an Act of the Legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another.

Id. Thus, this Court has long ignored even the express stipulations of parties as to "the legal issues in the present case and those resolved by" precedent. *Sanford's Estate v. IRS*, 308 U.S. 39, 51 (1939).

Decisions of this Court regularly rest on legal theories not propounded by the parties.[51] The tradition of *amicus curiae* in this Court and others is premised on a court's ability and need to look beyond the parties' understanding of the law.[52] In cases where a legal theory this Court finds essential to the decision requires further illumination, the Court has not hesitated to order rebriefing and reargument.[53] A court of appeals has comparable

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[51] *E.g., Kamen*, 111 S. Ct. at 1723 (unanimous); *Arcadia, Ohio*, 111 S. Ct. at 418; *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2247-2258 (1990) (unanimous); *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 110 S. Ct. 2034 (1990); *Teague v. Lane*, 109 S. Ct. 1060, 1069 (1989). Separate opinions also not infrequently set forth legal theories pressed by none of the parties. *See, e.g., Burke*, 112 S. Ct. at 1877 (Scalia, J., concurring); *American Trucking Associations, Inc. v. Smith*, 110 S. Ct. 2323, 2343 (1990) (Scalia, J., concurring); *Segura v. United States*, 468 U.S. 796, 805 (1984) (Burger, C.J., joined by O'Connor, J.).

[52] *See, e.g.*, Sup. Ct. R. 37.1, 28.7; Fed. R. App. P. 29.

[53] *E.g., Allied-Signal, Inc. v. Director, Div. of Taxation*, 112 S. Ct. 1461 (1992); *McKesson v. Division of Alcohol Bev. and Tobacco*, 492 U.S. 915 (1989); *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988); *Garcia v. San Antonio Metropolitan Transit Authority*, 468 U.S. 1213 (1984), *New Jersey v. TLO*, 468 U.S. 1214 (1984); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 422 U.S. 1005 (1975); *Benton v. Maryland*, 393 U.S. 994 (1968).

discretion to analyze the law governing cases before it, as its appellate jurisdiction, unlike this Court's, is plenary and mandatory.

Furthermore, the district court's conclusion that Section 92 was "inadvertently repealed in 1918" and its assumption that the repealed statute continued to exist "*in proprio vigore*" (*i.e.*, that the repealed statute might exert force, based on the power of opinion alone), 92-507 Pet. App. 44a-45a, provided ample basis for the court of appeals to exercise its discretion to revisit these questions. At the very least, the court of appeals had the *power* to review these decisions. *See* 28 U.S.C. § 1291.[54] Given the long history of courts alluding to Section 92, the appellate court may even have had a positive duty to avoid "reinforc[ing] error already prevalent in the system." *United States v. Burke*, 112 S. Ct. 1867, 1877 (Scalia, J., concurring).[55]

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[54] *See also Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991) ("the courts of appeals are vested with plenary appellate authority over final decisions of district courts").

[55] The court of appeals' review was strictly limited to the decisions below. The court of appeals upheld the district court's finding that Section 92 was repealed but overturned the district court's judgment that circumstances exist under which a repealed statute can survive through means other than re-enactment, which had not occurred. This Court has frequently exercised its discretionary jurisdiction to decide questions passed on below, but not pressed by the parties. *See, e.g., United States v. Williams*, 112 S. Ct. 1735, 1738, 1739 n.2 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991); *Stevens v. Dep't of Treasury*, 111 S. Ct. 1562, 1567 (1991).

D. The Court of Appeals Exercised Its Discretion Wisely.

Few lawsuits present as compelling a case for the exercise of appellate discretion to consider a legal analysis not pressed by the parties. The court of appeals was asked to construe a "statute [that] may not exist," a dubious alternative under established notions of the judicial function and judicial legitimacy. *See McCormick v. United States*, 111 S. Ct. 1807, 1820 (1991). If, as the court suspected, the statute does not exist, the court risked issuing a decision that was not only wrong but fanciful. In contrast, by deciding the validity of Section 92, the court strove to resolve the case in a manner consistent with existing law and standards of judicial economy.[56] As the federal petitioners acknowledge, it is "entirely proper for [a] court to decline to construe" a statute that has been repealed. Gov't Br. at 14 n.3.

The court of appeals undertook the analysis and resolution of the status of Section 92 fairly and carefully. In no sense could the "losing party claim to have been ambushed." *United States v. Williams*, 112 S. Ct. at 1739 n.2. Petitioners had "an opportunity to be heard" and "the opportunity to offer all the evidence they believe relevant to the issues." *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976). Furthermore, the issue under consideration by the court of appeals was a pure question of law, which appellate courts have long been recognized as well-situated to review *de novo*. *See, e.g.*, 5 U.S.C. § 706; *Salve Regina College*, 111 S. Ct. at 1221. The inquiry required no consideration of testimony or evidence, over

[56] Most of the parties affected by the decision on the Comptroller's ruling were already before the court either as parties or *amici*: the Comptroller and the major associations representing the banking and insurance-agency industries. The American Bankers Association, a trade association purporting to represent national and state-chartered banks in all fifty States and the District of Columbia, participated in the appeal as *amicus curiae*.

which district courts are given primary responsibility, nor even the application of law to facts. Empowered to consider the validity of law it was asked to construe, the court's exercise of that discretion was appropriate, fair, and circumspect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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